HARRY J. PHILLIPS

IBLA 80-262 Decided May 13, 1980

Appeal from decision of the California State Office, Bureau of Land Management, declaring the Keystone lode mining claim abandoned and void. CA MC 15700.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Assessment Work -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claims -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Assessment Work -- Mining Claims: Recordation

   Where the owner of an unpatented mining claim located before Oct. 21, 1976, files a copy of the original notice of location in the calendar year 1978, he is required by 43 CFR 3833.2-1(a) to file proof of assessment work for the assessment year ending on Aug. 31, 1979, on or before Oct. 22, 1979, failing which his claim is properly declared abandoned and void.

2. Federal Land Policy and Management Act of 1976: Assessment Work -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claims -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Assessment Work -- Mining Claims: Recordation

A mining claimant's failure to file timely evidence of annual assessment work is not excused by alleged tardiness of the State recorder's office in recording this information and returning a record copy to claimant, as a claimant is permitted under 43 CFR 3833.2-2(a) to satisfy the Federal filing requirements by submitting a duplicate of the assessment notice, even though it has not yet been filed for record with the State.

APPEARANCES: Harry J. Phillips, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Harry J. Phillips (appellant) has appealed the December 4, 1979, decision of the California State Office, Bureau of Land Management (BLM), declaring his Keystone lode mining claim abandoned and void.

The Keystone claim was located on July 11, 1974. On November 6, 1978, appellant filed a copy of the original notice of location of this claim with BLM, as required by 43 CFR 3833.1-2(a), which governs claims located on or before October 21, 1976, the effective date of the recordation requirements of section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976).

[1] Under the express terms of 43 CFR 3833.2-1(a), "The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording [i.e., recordation with BLM of a copy of the original notice of location], which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim." Appellant recorded the copy of the original notice of location with BLM in calendar year 1978. Thus, he was required to file evidence of his annual assessment work completed during the assessment year ending on August 31, 1979, on or before October 22, 1979, as this date is "sooner" than December 30 of 1979, the calendar year following the year in which he filed the copy of the original notice of location.

Appellant did not file his proof of assessment work for 1979 until November 19, 1979, after the October 22 deadline. Accordingly, BLM properly declared his claims to be abandoned and void. 43 CFR 3833.4.

[2] Appellant argues that his failure to file this material timely should be excused because he did not receive a record copy back from the State recorder until after this deadline, although he had filed it in August. He asserts that the situation is the State recorder's fault.

Under 43 CFR 3833.2-2(a) a mining claimant is permitted to satisfy the Federal filing requirements by submitting a duplicate of the affidavit of assessment work to be filed locally, even though it has not yet been filed for record. See James E. Strong, 45 IBLA 386 (1980). Thus, appellant could have timely submitted a duplicate, and the State recorder's delay is therefore irrelevant.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

At first blush, it might appear that the case is moot because of the relocation of the claim by appellant. The ultimate paragraph of his appeal reads as follows:

> As the Bureau of Land Management in Sacramento suggested on December 4, 1979, I relocated the Keystone Lode Claim under the name of the Late Keystone Lode Claim, on December 9, 1979, sending the BLM office in Sacramento a certified recording from the San Diego Recorders Office.

A relocation is not necessarily adverse to the earlier claim on the land. In United States v. Consolidated Mines and Smelting Co., Ltd., 455 F.2d 432, 441 (9th Cir. 1971), the court stated in applicable portion as follows:

> But Consolidated claimed that some of its location notices were actually relocation notices. This contention was dismissed by the Department with the observation that relocation is necessarily adverse to the interests of prior locators. Thus, the Department concluded, Consolidated's rights in its mining claims must date from the "relocation" notices filed after the withdrawal. This generalization is correct only if the relocator claims against, rather than through, the prior locator. If a relocator claims through the prior locator, ordinarily the relocation notice relates back. See part IV, infra. The evidence before the Department did not indicate whether Consolidated claimed through or against its predecessors. Thus the Department's generalization is supported only by an unjustifiable assumption of fact. Accepting arguendo Consolidated's status as a relocator, hearings would have been desirable to ascertain the relationship between Consolidated's relocations and prior locations made by persons through whom Consolidated claimed. [Emphasis supplied.]

The 9th Circuit emendated further at 455 F.2d 448-9, as follows:

> The location notices before the Bureau may be segregated into three categories. Five of the claims are specifically declared to be relocations of abandoned claims. With respect to these claims Consolidated's rights cannot date from a time prior to the date of relocation. The trial court in Cheesman v. Shreeve, 40 F. 787, 789 (D. Colo.1889) charged the jury as follows:

> "* * * (I)f ground once included with the location of a lode mining claim be abandoned, and a new location made thereon, as abandoned ground, said location dates only from the relocation thereof as abandoned ground, and does not relate back to or obtain any right on account of the location which has been abandoned * * *."

Accord, 2 American Law of Mining § 8.6 at 198, 199.

A number of claims located after the Ickes withdrawal were declared to be partial relocations of abandoned claims. To this extent, these claims are subject to the rule of Cheesman v. Shreeve, supra.

> * * * As far as the Bureau could determine, these claims were established by original location notices filed after the Ickes withdrawal. If, as Consolidated maintains, some of these claims were relocations of prior, valid but defective claims, the Ickes withdrawal might not invalidate the relocations. The general rule is that relocations (or amendments) relate back to original, valid although defective locations through which the relocator claims. Kirkpatrick v. Curtiss, 138 Wash. 333, 244 P. 571 (1920); 2 American Law of Mining § 8.25. On the other hand it is generally held that relocation will not relate back to the detriment of intervening rights. Karnes v. Flint, 153 Wash. 225, 279 P. 728 (1929); 2 American Law of Mining § 8.25. Some authorities refuse to apply this exception to the relation back rule if the relocator is attempting merely to perfect his claim to ground included in the original location. See cases cited at 2 American Law of Mining § 8.25 at 237, n. 6. [Footnote omitted; Emphasis supplied.]

Thus the manifestation of claimed intervening rights would bring into issue the viability of the original location. We cannot assume blithely the absence of such claimed rights and therefore the resolutions of the appeal, rather than its consideration as moot, is appropriate. See Everett Yount, 46 IBLA 74 (1980).

Frederick Fishman
Administrative Judge